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No. 06-728

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In the

Supreme Court of the United States

JACK MURPHY, individually and as a member of AK Capital LLC, suing on behalf of himself and all other members of AK Capital LLC similarly situated and in the right of AK Capital LLC,

Petitioner,

v.

KOREA ASSET MANAGEMENT CORPORATION,

Respondent,

AK CAPITAL LLC,

Defendant.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR REHEARING

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INTRODUCTION

Petitioner Jack Murphy respectfully moves this Court for an order (1) vacating its denial of his petition for a writ of certiorari, entered on June 25, 2007, and (2) granting the petition to review a Second Circuit decision in which a Korean company defrauded an American citizen and his company out of $27 million. The Korean firm was permitted to escape liability for its fraudulent actions under the Foreign Sovereign Immunities Act of 1976 ("FSIA").[1] The following *intervening circumstances* of a substantial effect warrant rehearing under the mantle of Rule 44(2):

1. **THIS COURT GRANTED CERTIORARI IN *POWEREX CORP. v. RELIANT ENERGY SERVICES, INC.* WHILE JACK MURPHY'S PETITION WAS PENDING YET NEVER ADDRESSED THE MERITS OF THE ISSUE — DESCRIBED BY THE SOLICITOR GENERAL AS AN "IMPORTANT, RECURRING, AND SENSITIVE ONE THAT WARRANTS THIS COURT'S CONSIDERATION" — BECAUSE OF PROCEDURAL DEFAULTS IN *POWEREX***

Our petition for certiorari urged the Court to settle the profound issue that has ignited the alarming and ever-widening split in the Circuits over what standard should be applied under the Foreign Sovereign

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[1] Pursuant to Supreme Court Rule 29.6, AK Capital LLC is a limited liability company organized under the laws of the State of Delaware. It has no parent company or subsidiaries, and there are no publicly held companies that own 10% or more of the corporation's stock. Jack Murphy is a former United States Congressman who served in the United States Army during the Korean War (A.373).

Immunities Act to gauge whether a corporation is an "organ" of a foreign government and, thus, is entitled to the radical relief of being forever immunized from suit in this country for damages caused by its tortious and wrongful conduct.[2]

While this petition was still pending, on January 19, 2007, the Court granted certiorari in *Powerex Corp. v. Reliant Energy Services, Inc.*, No. 05-85, to decide that issue. The Solicitor General warned that the common question, posed by *both* cases, is an "*important, recurring, and sensitive one that warrants this Court's consideration.*" And, he pleaded with this Court to definitively decide this preeminent question, which has proven to be of an enduring nature.[3]

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[2] Pursuant to 28 U.S.C. § 1603(b)(2), an "instrumentality" of a foreign state is any entity which is an "*organ* of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof" (emphasis supplied). The term "organ" is not defined in the statute. And, this Court has "never addressed the meaning or application" of what constitutes an instrumentality of a foreign sovereign under that provision. *See* Solicitor General's Brief as Amicus Curiae at 8, in *Powerex Corp. v. Reliant Energy Services, Inc.*, No. 05-85 (Nov. 14, 2006).

[3] *See* Solicitor General's Brief as Amicus Curiae at 8, in *Powerex Corp. v. Reliant Energy Services, Inc.*, No. 05-85 (Nov. 14, 2006) (emphasis supplied).

Despite the Solicitor General's appeal, on June 18, 2007, this Court disposed of *Powerex* on procedural grounds.[4] Thus, the government's considerable concerns have been left *unresolved*. As a consequence, the intensity of the FSIA issue, presented by our petition, remains contentious and ripe for resolution. Moreover, our case is not handicapped by the procedural disability that enjoined the resolution of the *Powerex* petition.

The principal casualty of this unsettled issue is the growing uncertainty concerning what constitutes an organ of government under the FSIA. This continues to be a cause of deep anxiety for all Americans who regularly do business with foreign companies but have no definitive forum for rectifying any injury done to them by these corporations.[5]

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[4] The majority held that there was no jurisdiction, under 28 U.S.C. § 1447(d), for the federal appellate court to review the district court's decision remanding the matter back to the state court from which it was removed. *See Powerex Corp. v. Reliant Energy Services, Inc.*, No. 05-85, 127 S. Ct. 2411, 75 USLW 4437 (June 18, 2007). Justices Breyer and Stevens *dissented and would have addressed the abiding FSIA question.*

[5] *See* "Supreme Court Refuses to Rule on Whether Powerex is a Foreign Sovereign Immune from Domestic Suit, Citing Procedural Faults of 9th Circuit Ruling," *Foster Electric Rep.* 8 (June 27, 2007), available at 2007 WLNR 12566534.

Likewise, foreign governments and their instrumentalities have a paramount interest in seeking a uniform construction of the law concerning their level of liability, under the FSIA, for wrongful conduct.[6] This unpredictability is bound to lead to a torrent of litigation in the highly sensitive field of international relations.

Finally, recognizing the vital nature of this issue, the Solicitor General stressed that a "*proper understanding* of the 'organ' prong is of *considerable significance* under the FSIA in light of *Dole Food*'s clarification of the majority-ownership test for agency or instrumentality status."[7]

We respectfully submit that consideration of this matter — through rehearing of our petition for certiorari — is urgently needed in this pivotal case, which provides a competent and ideal vehicle for resolving a perennial issue that, if not attended to now, will only grow worse and worse over time.

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[6] For example, the Canadian government underscored that "[i]n order to properly exercise their powers, foreign sovereigns need predictability with respect to the way United States courts interpret the FSIA's applicability to entities created by sovereigns and conducting activities on their behalf." *See* Government of Canada's Brief as Amicus Curiae at 6, in *Powerex Corp. v. Reliant Energy Services, Inc.*, No. 05-85 (Aug. 17, 2005).

[7] *See* Solicitor General's Brief as Amicus Curiae at 13, in *Powerex Corp. v. Reliant Energy Services, Inc.*, No. 05-85 (emphasis supplied). *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003), held that to qualify as an "instrumentality" under § 1603(b)(2), the foreign state must directly own a majority of the corporation's shares.

2. INTERVENING AND CONFLICTING DECISIONS FROM THE APPELLATE COURTS UNDERSCORE THE NEED FOR FINAL RESOLUTION OF THIS PERSISTENT PROBLEM, WHICH IS OF INTERNATIONAL CONCERN

We believe that by granting certiorari in *Powerex*, this Court sought to settle the open question of what standards should be used to judge whether a foreign corporation is an organ of government. This mounting controversy will persist until finally put to rest. In fact, while our petition was pending, these very issues were again pushed to the forefront when they erupted in the Fifth Circuit. *See Board of Regents of University of Texas System v. Nippon Telephone & Telegraph Corp.*, 478 F.3d 274 (5th Cir. 2007). There, the Fifth Circuit complained that there is "no 'clear test' for determining organ status." *Id.* at 279.

In finding that Japan's telecommunications company was *not* a governmental organ, the Fifth Circuit reached a conclusion that simply cannot be reconciled with the Second Circuit's decision in this case. For example, Japanese law *requires* Nippon Telephone to provide universal service to all its people. 478 F.3d at 279. Nevertheless, the Fifth Circuit found it was not an organ of government because it also had commercial purposes. *Id.* However, in our case, the Second Circuit

found that the Korea Asset Management Corporation ("KAMCO") was a governmental organ even though it "behaves" like a "typical for-profit corporation" in most respects (App. 9).[8]

The Fifth Circuit further construed the FSIA to subject Nippon Telephone to civil suit even though the Japanese government must approve its board members *and* regulates its distribution of profits. 478 F.3d at 279. The court reasoned that needing governmental authorization in these areas is *not* equivalent to "active supervision" by the government. *Id.*

In sharp contrast, the Second Circuit found that virtually identical indices of governmental oversight defined KAMCO as an organ of the Korean government. And, accordingly, it was insulated from suits by Americans who were harmed by its wrongdoing (App. 40).

The profoundly deepening division in the Circuits lends enormous force to this important issue that is of incalculable national and international consequence. Certainly, under any uniform federal system, the success or failure of a suit, brought by an American citizen who has been injured by a foreign company, cannot be made to depend on whether it is located in the Second, Fifth or Ninth Circuits. Unless mediated by this Court, this languishing conflict over construction of the Foreign Sovereign Immunities Act will become intolerable.

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[8] KAMCO is a joint-stock corporation that has generated annual profits of over $19 million. Its shareholders include a group of private Korean banks (28.6%); the Korea Development Bank (28.6%); and the Korean government (42.8%). (App. 9-10).

This Court has, in extraordinary cases, granted rehearing even though certiorari was originally denied.[9] And, the current case — involving urgent principles of international comity and the vitality of the Foreign Sovereign Immunities Act itself — is equally worthy of that same relief. As emphasized by the Solicitor General, a "closer study" of the case law throughout the nation reveals a "*critical divergence in the manner in which the various circuits apply their seemingly similar tests.*"[10]

We urge, most respectfully, that *now* is the time for this Court to undertake the "closer study" that is so desperately needed to quiet this increasing conflict in the law. And, this case, involving an American citizen and company that were defrauded out of $27 million by a Korean corporation, presents an appropriate platform for this Court's review. Since an acute examination of this issue is essential, the denial of certiorari should be reconsidered to the end that this case be heard.

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[9] *See, e.g., Florida v. Rodriguez*, 461 U.S. 940 (1983); *Black v. United States*, 385 U.S. 26 (1966); *Gondeck v. Pan Am. World Airways, Inc.*, 382 U.S. 25 (1965); *United States v. Ohio Power Co.*, 353 U.S. 98 (1957). This list is, of course, illustrative only and by no means exhaustive.

[10] *See* Solicitor General's Brief as Amicus Curiae at 9, in *Powerex Corp. v. Reliant Energy Services, Inc.*, No. 05-85 (Nov. 14, 2006) (emphasis supplied).

CONCLUSION

The issue presented here is obviously a matter of grave concern, as evidenced by this Court's grant of certiorari in *Powerex*. However, due to procedural problems in *Powerex* this recurring question has been left unresolved. For these reasons, as well as those contained in the petition for a writ of certiorari, Petitioner prays that this Court grant rehearing of the order of denial, vacate that order, grant the petition and review the judgment and opinion below.

July 20, 2007

Respectfully submitted,

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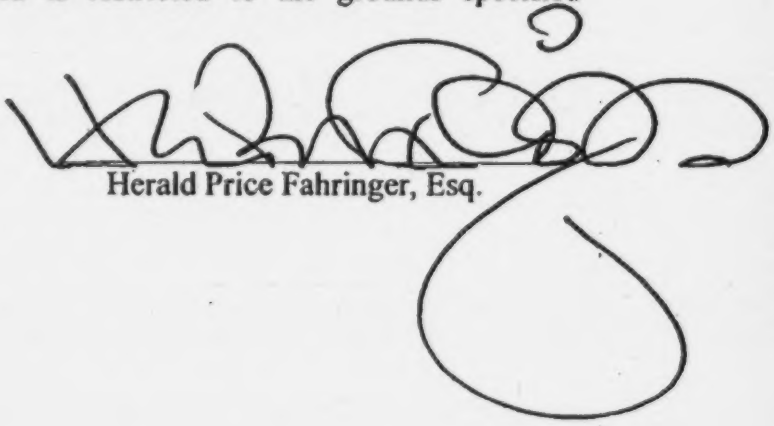
CERTIFICATE OF COUNSEL

As counsel for the Petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 44.2.



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